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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 731

ALABAMA STATE TEACHERS ASSOCIATION, *et al.*,

Appellants,

—v.—

ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Middle District of Alabama, entered on July 26, 1968, denying declaratory and injunctive relief, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the court below is as yet unreported and is set forth as Appendix A, pp. 1a-13a, *infra*.

Jurisdiction

This is a civil action brought pursuant to 28 U.S.C. §§1343 and 1331, and 42 U.S.C. §1983, for declaratory and injunctive relief against the operation of Ala. Acts, Reg. Sess. 1967, No. 403 [hereinafter cited as Act No. 403].

Appellants sought to restrain the enforcement of Act No. 403 on the grounds that it violated their rights under the Equal Protection Clause by failing to encourage disestablishment of the dual system of racially segregated public colleges in Alabama.

The judgment of the United States District Court for the Middle District of Alabama denying an injunction was entered July 26, 1968 (R. 695; App. pp. 1a-13a, *infra*). Notice of appeal to this Court was filed in the district court September 13, 1968 (R. 935).[1]

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1253 to review the judgment of the district court of three judges necessarily convened pursuant to 28 U.S.C. §2281. Appellants in this case sought declaratory and injunctive relief against the operation of Act No. 403, which authorizes the Alabama Public School and College Authority to issue and sell bonds in the principal amount of $5,000,000 for the purpose of establishing a 4-year college at Montgomery under the supervision and control of Auburn University.[2] A three-judge court was properly convened under 28 U.S.C. §2281 because this is an action seeking to restrain state officials from enforcing a state statute on the ground that it is unconstitutional because it defines and effectuates a state policy of constructing facilities for higher education without regard to the para-

[1] Notice of appeal to the United States Court of Appeals for the Fifth Circuit was filed August 23, 1968; and a motion to hold the appeal in abeyance pending disposition of the appeal in this Court was filed October 25, 1968, and granted November 5, 1968.

[2] The formation of the Alabama Public School and College Authority was authorized by Ala. Acts, 1st Spec. Sess. 1965, No. 243 [hereinafter cited as Act No. 243] which gave the Authority, a public corporation, the power among others,

> to provide for the construction, reconstruction, alteration and improvement of public buildings and other facilities for public educational purposes in the State, including the procurement of sites and equipment therefor. (R. 8)

mount federal obligation to disestablish the dual system based upon race. See, *e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968), *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962), *Query* v. *United States,* 316 U.S. 486 (1942). This is not, therefore, merely an attack upon the "unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional." *Cf. Ex parte Bransford,* 310 U.S. 354, 361 (1940) (dictum). Nor is it a matter of purely local concern, because here relief is sought against the action of state agents, acting under a state statute expressing the state's policy in relation to a new segment of the statewide system of public colleges. See, *e.g., Spielman Motor Sales Co.* v. *Dodge,* 295 U.S. 89 (1935); *Sailors* v. *Board of Educ. of the County of Kent,* 387 U.S. 105 (1967).

Statute Involved

The statute involved in this case is Ala. Acts, Reg. Sess. 1967, No. 403, the complete text of which follows:

AN ACT

To authorize the Alabama public school and college authority, a public corporation, to issue and sell additional bonds in the principal amount of $5,000,000 for the purpose of constructing, equipping, establishing, creating, supporting and maintaining a four-year college at Montgomery under the supervision and control of the board of trustees of Auburn University.

Be It Enacted by the Legislature of Alabama:

Section 1. The Alabama public school and college authority created and established under the provisions of Act No. 243, H. 29, approved May 4, 1965 (Acts, First Special Session 1965, p. 331) is hereby authorized to issue and sell its bonds in the principal amount of $5,000,000 in addition to all other bonds heretofore

issued or heretofore authorized to be issued by said authority. All bonds sold under authority of this Act shall be issued, secured by, and the principal and interest amortized and paid in the same manner and from the same funds as prescribed in said Act No. 243 of the First Special Session of 1965 with respect to bonds previously issued by the authority. Proceeds of the sale of such bonds shall be deposited, and disbursed for the sole purpose herein provided, and all work undertaken hereunder, and all contracts let hereunder shall be supervised and shall be in all other respects governed by the provisions of said Act No. 243 of 1965.

Section 2. The proceeds of all bonds issued and sold by the authority under this Act remaining after paying expenses of their issuance shall be deposited in the state treasury, and shall be carried in the state treasury in a special or separate account. The net proceeds derived from sale of the bonds shall be distributed to Auburn University to be used by the board of trustees thereof for construction and equipment of physical facilities for conducting a four-year college or branch of the University in the City of Montgomery and for the support and maintenance of such college for each of the fiscal years ending September 30, 1968 and September 30, 1969.

Questions Presented

1. Does the State have an affirmative duty to disestablish a dual system of higher education based upon race?

2. Where the record shows that the proposed construction by a predominantly white university of a college in Montgomery duplicating an existing, virtually all-Negro college, was planned without regard to its effect upon the

disestablishment of the dual system, was it proper for the court to deny injunctive relief?

Statement of the Case

Until the recent past, the public institutions of higher education maintained and operated by the State of Alabama and its agencies were racially segregated as a matter of law, policy and practice. Statutes still on the books designate institutions as being for "whites" or "Negroes." Ala. Code, Tit. 52, §§438, 455, 455(3), 466 (1958). Indeed, §10(h) of Act No. 243 (R 5), which established defendant Alabama Public School and College Authority, designates various institutions as "Negro." And as recently as 1963 a federal court was called upon to order Auburn University, the predominantly white institution whose establishment of a branch in Montgomery is challenged in this action, to admit Negroes, after findings that, apart from the two Negro institutions, all other public institutions of higher education in the State of Alabama were for whites only, by statute, custom and tradition. *Franklin* v. *Parker,* 223 F. Supp. 724 (M.D. Ala. 1963), *modified* and *aff'd.,* 331 F.2d 841 (5th Cir. 1964).[3] And in 1967 the court in *Lee* v. *Macon County Bd. of Educ.,* 267 F. Supp. 458, 474 (M.D. Ala.), *aff'd.,* 389 U.S. 215 (1967), noted that Alabama's trade schools, vocational schools and state colleges[4] "continue to

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[3] See also *Lucy* v. *Adams,* 134 F. Supp. 235 (N.D. Ala.), *aff'd.,* 228 F.2d 619 (5th Cir. 1955), *cert. denied,* 351 U.S. 931 (1956), where the court found the University of Alabama guilty of a tacit policy of excluding students from admission on the basis of race. The Negro who subsequently enrolled was expelled. And it was not until federal troops were brought in that Negroes applying in 1963 were finally allowed to register. See 8 R.R.L.R. 448-58. It is the proposed expansion of the University of Alabama's Extension Center that is the subject of this suit.

[4] The court used the term "state colleges" to refer to "all state colleges or universities except the University of Alabama, Auburn University, University of South Alabama at Mobile, and Alabama

be operated on a segregated basis . . : as if *Brown* v. *Board of Education* were inapplicable in these areas."

The court below took judicial notice of the fact that "Alabama has traditionally had a dual system of higher education," and found as a fact that "the dual system in higher education has not been fully dismantled." (App. pp. 6a-7a, *infra*). And it is indeed clear that the dual system is far from being "fully dismantled." See Apps. B, C and D, pp. 14a-18a, *infra*.[5]

Alabama State College is at present the only public, accredited, degree-granting senior college in Montgomery. It is, for all practical purposes, an all-Negro school, created as such by statute, Ala. Code, Tit. 52, §438 (1958), and perpetuated as such in fact. The record indicates that as of the fall of 1967, Alabama State had two white students and two white teachers out of a total of about 1800 students and 85 teachers (R. 834, 847-48, 693; App. D, *infra*, p. 17a). In addition there exists in Montgomery the University of Alabama Extension Center. This is a small, predominantly white, non-degree-granting institution, providing college courses, mostly given at night.

Interest in another state-supported institution of higher education in Montgomery was initially generated by the

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College at Montevallo, which institutions have separate boards of trustees and are not administered by the Alabama State Board of Education." 267 F. Supp. at 474 n. 19.

[5] It is worth noting that even those state institutions—most of the trade schools and junior colleges—created in recent years have clear racial identification in faculty and student body (R. 685-86, 721-29; App. D, pp. 17a-18a *infra*). Thus the State has not merely perpetuated, but is continuing to engender racial institutions. As a corollary it should be noted that the Alabama Education Study Commission, created by the Legislature in 1967 to study higher educational needs throughout the State and come up with a 10-year projected plan, has only white members (R. 783).

Montgomery Chamber of Commerce, an apparently all-white organization. Its Education Committee was reactivated in January, 1966, under the chairmanship of Mr. Holman Head, primarily to work in developing a new college. The Committee had no Negro member (R. 746).

As the court below found, "apparently it was assumed from the beginning that expansion of the Alabama Extension Center was the way to proceed." (App. 9a, *infra*). Officials of the predominantly white University of Alabama were first approached to see if they would be willing to undertake expansion of the Center. When the University of Alabama decided that it would not, negotiations turned to Auburn University.

Auburn University was established by statute as a white university, Ala. Code, Tit. 52, §455 (1958), and admitted its first Negro student in 1964 as a result of court action (R. 781; 60-61; *and see Franklin* v. *Parker, supra,* p. 5). In the fall of 1967, with the largest number of Negro students ever, Auburn had only 41 Negro students out of a total enrollment of about 13,000, and only three part-time Negro teachers out of a total faculty of about 800 (R. 780-782; 104-06; 60-70, App. B, p. 14a *infra*). Ultimately it was agreed that Auburn would take over the University of Alabama's Extension Center, and expand it to form a new branch of Auburn in Montgomery. The Chamber of Commerce Education Committee then met with the Montgomery legislative delegation, headed by Senator Joe Goodwyn, who introduced Act No. 403, which authorizes the Alabama Public School and College Authority to raise money for the purpose of establishing a 4-year college at Montgomery under the supervision and control of Auburn. After the bill was enacted in September, 1967, the Chamber of Commerce created a site selection committee, whose members were all white (R. 779, 234). And Auburn Uni-

versity set up a five-man committee, also all-white, to plan the educational program for its Montgomery Branch (R. 79-80), and appointed Dr. Henry Handley Funderbunk, Jr., as Vice President for Montgomery Affairs.

Alabama State College was not consulted in any stage of the planning of the new college, nor was its participation sought in any manner. The sole contact with Alabama State was a visit in February, 1967, to Dr. Levi Watkins, President of Alabama State College, to advise him as to what was happening (R. 763-64, 829-31).

Indeed, up to this present time no Negro or Negro institution has been involved *in any form* in the planning of the new institution in Montgomery, nor have any Negro groups even been consulted regarding their needs for the proposed institution (R. 753-55).

Moreover, in none of the reports, surveys, discussions, and conversations regarding the establishment of the new institution was any mention made, or thought expressed, as to the effect of the proposed institution on the dual system of education in Alabama. Indeed, the state officials involved proclaimed their complete disinterest in racial considerations.[6] And, as the court below found, "defendants apparently did not seriously evaluate Alabama State College's potential as an alternative." (App. 11a, *infra*). Alabama State College was said to have been rejected as a possibility because of the limitations of its "very basic curriculum" (R. 753), yet a small, non-degree-granting center offering primarily night school courses was chosen in its place for expansion. The failure to even consider the possibility of

[6] For example, Holman Head was asked by counsel for the Alabama Public School and College Authority whether "in any of those discussions with Senator Goodwyn or any of your reports, was there any mention of race or color in any respect?" His answer was "None whatsoever." (R. 777).

either expanding Alabama State, or establishing a program in cooperation with it, is particularly striking in view of the fact that the new institution was intended to have essentially the same kind of curriculum, with an emphasis on education, liberal arts, and business, as existed at Alabama State (R. 742-44, 818-19, 87-88; compare R. 131 with Plaintiffs' Exhibit No. 3).

Finally, there is evidence that the proposed Auburn branch was designed to serve the needs of the white students in Montgomery now commuting to institutions outside of Montgomery rather than going to the Negro Alabama State College.[7] Student recruitment efforts for the Auburn branch have been directed at white high schools to the complete exclusion of Negro high schools. During December of 1967 Dr. Robert Strong, the white Director of High School and Junior College Relations at Auburn, requested permission of various high schools in Montgomery and surrounding counties to visit them to explore senior interest in the Auburn branch. However, he neither contacted nor visited any Negro high schools.[8] Although there was some indication in the record that Negro high schools were to be visited later, it cannot possibly have been a coincidence that the white schools were visited first, and in a group. Indeed, in one day Dr. Strong made a recruiting visit to three white

[7] There was testimony at the hearing that this was Senator Goodwyn's reason for introducing the bill authorizing the new college (R. 903).

[8] See generally R. 873-899; 912-927. Dr. Strong testified that he telephoned George Washington Carver High School but was unable to reach either the principal or the guidance councellor. However, while he left a message to return the call, the message apparently made no mention of the Auburn branch; Dr. Strong did not call again; and when the guidance councellor called back to inquire what the purpose of the call was, Dr. Strong made no mention of the Auburn branch, allegedly because the legal action had intervened and "my instructions were that we would delay this until something was settled." R. 915-916.

high schools in Montgomery, two public and one private, but failed to visit the four Negro high schools in Montgomery. On Dr. Strong's only other recruiting trip for the Auburn branch he visited a white high school in Wetumka, but failed to visit the two Negro high schools in that same town; instead he visited that same day a white high school in Prattville in another county, again failing to visit the Negro high school in that town (R. 923-925).

Appellants sought in this action declaratory and injunctive relief against the operation of Act. No. 403, authorizing the creation of the Auburn branch at Montgomery.[9] In its decision announced July 26, 1968, the court below noted initially that plaintiffs' basic argument—that the duty to disestablish the dual system of education applied equally to higher education, and that that duty requires officials to utilize new construction as an opportunity to disestablish the dual system—presented a case of first impression. The court took judicial notice of the fact that Alabama had "traditionally had a dual system of higher education," and found as a fact that "the dual system . . . [had] not been fully dismantled;" and it recognized that "the law is clear also that the State is under an affirmative duty to dismantle the dual system." However, the court stated that it did not "agree that the *scope* of the duty should be extended so far in higher education as it has been in the elementary and secondary public schools area," and stated that it was "reluctant at this time to go much beyond preventing discriminatory admissions." (App. 6a-7a, *infra*). The court noted that, unlike institutions of higher education, public

[9] Originally appellants also sought relief against the operation of Act No. 243, authorizing the establishment of the Alabama Public School and College Authority, but at the beginning of the hearing on the merits of this case, plaintiffs announced that they did not "urge upon the Court at this time" their claim that Act No. 243 was unconstitutional.

elementary and secondary schools were traditionally free and compulsory, and that, prior to "freedom of choice," children were assigned to schools. The court concluded that, while in planning new construction or expansion the state legislature should consider numerous variables including *impact on the* dual system, "in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved." (App. 7a-8a, *infra*).

The court nevertheless did consider the development of the plans for the Auburn branch in Montgomery, stating that "a brief review of the background of this case will, we think, reveal the wisdom of this conclusion" (that courts should not review construction decisions). (App 8a, *infra*). The court stated that plaintiffs had not shown that the Auburn branch was designed to provide for white students only. And in answer to plaintiffs' contention that inadequate consideration was given to how the proposed Auburn branch might be operated so as to disestablish the dual system, the court stated that "it is at least as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve;" and stated further that "in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs." The court conceded that "defendants apparently did not seriously evaluate Alabama State College's potential as an alternative," but noted that evidence was introduced indicating that Auburn was more appropriate for a variety of educational reasons (App. 10a-11a, *infra*).

The court concluded that, "as long as the State and a particular institution are dealing with admissions, faculty

and staff in good faith the basic requirement of the affirmative duty to dismantle the dual system on the college level . . . is satisfied." (App. 11a, *infra*).

THE QUESTIONS ARE SUBSTANTIAL

I.

The Court Below Erred in Holding That the Scope of the Affirmative Duty to Disestablish a Dual System of Education Is More Limited in the Area of Higher Education Than in the Area of Elementary and Secondary Education and, Specifically, That It Does Not Include Any Enforcible Duty to Consider Disestablishment as a Factor in the Planning of New Construction or the Expansion of Existing Facilities.

The court below clearly held that the scope of the duty to disestablish the dual system of education does not include, in the area of higher education, the requirement enforced in the areas of primary and secondary education to plan construction so as to further the disestablishment of the dual system. The court's entire discussion of the particular facts of the case was within the context of this holding (See II, *infra* pp. 22-23).

The court's opinion, in concluding that as long as admissions, faculty and staff are dealt with in good faith, the State's obligations under the equal protection clause are satisfied, in effect, although not in words, denies the existence of any duty to take affirmative steps to uproot the dual system on the higher education level, and tacitly revitalizes the destructive dictum of *Briggs* v. *Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955): "The Constitution . . . does not require integration. It merely forbids discrimination."

Certainly the affirmative duty to disestablish the dual system has by now been firmly established, and the ghost of *Briggs* v. *Elliott*, *supra*, laid to rest, in the area of primary and secondary education. See, *e.g.*, *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *United States* v. *Jefferson County Board of Educ.*, 372 F.2d 836 (1966), *aff'd. en banc*, 380 F.2d 385 (5th Cir. 1967), *cert denied*, 389 U.S. 840 (1967). There appears to be no legitimate reason to limit the scope of this duty in the area of higher education although, because of differences in the systems, different methods might be appropriate in achieving integration. See *infra*, p. 17. In *Jefferson*, *supra*, the court pointed out that:

> the central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law. . . . Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. (372 F.2d at 867)

In higher education the original vice was simply establishment by law of separate white and Negro institutions; this too has resulted in the continuing operation of separate, identifiable, white and Negro institutions. The duty to disestablish this system by any available, appropriate method would seem to be equally important. Indeed, it is ironic that the lower court here should find this duty, stemming originally from *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown* I), 349 U.S. 294 (1955) (*Brown* II), of limited applicability in the field of higher education when the very forerunners of *Brown* were cases involving higher education. See *Missouri ex rel Gaines* v. *Canada*, 305 U.S. 337 (1938), *Sipuel* v. *Board of Regents of the University of Oklahoma*, 332 U.S. 631 (1948), *Sweatt* v. *Painter*, 339 U.S.

629 (1950), *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950). Indeed in *Frasier* v. *Board of Trustees of the University of North Carolina*, 134 F. Supp. 589, 592-93 (M.D.N.C. 1955), *aff'd.*, 350 U.S. 979 (1956), the court stated that there was nothing in *Brown* v. *Board of Education*, *supra*, "to suggest that the reasoning does not apply with equal force to colleges as to primary schools. Indeed, it is fair to say that . . . [it applies] with greater force to students of mature age in the concluding years of their formal education as they are about to engage in the serious business of adult life," citing and quoting from *Sweatt* v. *Painter*, *supra*. And in *Florida ex rel. Hawkins* v. *Board of Control*, 350 U.S. 413-14 (1956), this Court held that the "deliberate speed" rule of *Brown* II was not applicable to graduate study, because it did not present the "problems of public elementary and secondary schools," and there was therefore "no reason for delay."

Recognition of the affirmative obligation to disestablish the dual system led inevitably to the doctrine that, to the extent consistent with the proper operation of the school system, new construction and the expansion of existing facilities should be undertaken with this obligation in mind, a doctrine which is by now well-established. See, *e.g.*, *United States* v. *Jefferson County Board of Educ.*, 372 F.2d 836, 877, 900 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840, (1967).[10] *Lee* v. *Macon County Board of Education*, 267 F. Supp 458 (M.D.Ala. 1967) (3-judge court); *United States* v. *Board of Public Instruction of Polk County, Florida*, 395 F.2d 66 (5th Cir., 1968); *Kelley* v. *Altheimer*, 378 F.2d 483, 496

[10] "The defendants, to the extent consistent with the proper operation of the school system as a whole, shall locate any new school and substantially expand any existing schools with the objective of eradicating the vestiges of the dual system and of eliminating the effects of segregation." (372 F.2d at 990)

(8th Cir. 1967); *Brewer* v. *School Board of the City of Norfolk*, 397 F.2d 37 (4th Cir. 1968).

These cases imply no distinction between grade schools and higher education. But the court below found this new construction doctrine inapplicable to the area of higher education on the grounds that: (1) higher education, unlike primary and secondary education, is traditionally neither free nor compulsory; (2) students choose which institution of higher education they will attend while, prior to "freedom of choice," children were assigned to their primary and secondary schools; (3) higher educational institutions present a "full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and hiring arrangements . . . ," while grade schools are, in principle at least, substantially similar. The court concluded, therefore, that in reviewing a decision regarding the construction or expansion of an institution of higher education "to determine whether it maximized desegregation, we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved." (App. pp. 7a-8a, *infra*).

The court's reasoning simply does not withstand analysis. Public institutions of higher education may not be completely free, but they are still public institutions, supported and directed by the state. The fact that education is not compulsory in Alabama after the age of 16 should make efforts to further the desegregation of institutions of higher education *less* rather than *more* problematical since there is no question of forcing whites to attend schools with Negroes. In *Watson* v. *City of Memphis*, 373 U.S. 529, 532 (1963), this Court, in holding that delay in the desegregation of public parks and other municipal recreational facilities was not warranted, noted that such desegregation

did not "present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, *at which attendance is compulsory*, the adequacy of teachers and facilities crucial, and questions of geographic assignment often of major significance." (emphasis added). And the opinion noted that the need for delay in desegregation had not been extended to state colleges and universities "in which like problems were not presented." 373 U.S. at 532 n.4. See *supra*, p. 14.

The court's second point likewise has no validity. While traditionally children were assigned to their primary and secondary schools, after the decisions in *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294 (1955), the Southern school districts almost uniformly changed to "freedom of choice" systems, and it was within the context of "freedom of choice" that the new construction doctrine was developed. See, *e.g.*, *United States* v. *Jefferson County Board of Educ.*, *supra*, p. 14; *Lee* v. *Macon County Bd. of Educ.*, *supra*, p. 14; *United States* v. *Board of Public Instruction of Polk County, Florida*, *supra*, p. 14; *Montgomery County Bd. of Educ.* v. *Carr*, 400 F.2d 1 (5th Cir. 1968). In *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968), this Court held that where freedom of choice failed to succeed in producing a unitary, non-racial system, school systems would have to abandon it in favor of zoning or some other system that promised to work better. Since, as noted below, "freedom of choice" seems an appropriate system for higher education, doctrines such as the new construction doctrine, which can be used to make freedom of choice succeed in producing a unitary, non-racial system, are of *particular* importance in the area of higher education.

The court's third reason has more colorable validity, since public institutions of higher education have traditionally been supposed to present a greater diversity

of opportunities than grade schools. This distinction would be of considerable relevance to a decision as to whether zoning ought ever be substituted for freedom of choice in the area of higher education. But it appears to have no relevance to the propriety of the new construction doctrine. The court's argument is apparently that in deciding on construction or expansion in the area of higher education, officials must, because of the greater variety in higher education, take into account a greater complex of variables than in making such decisions on the primary and secondary level. This however does not necessarily follow. There are numerous complicating factors on the primary and secondary level which don't exist on the higher education level: for example, transportation problems (since grade school systems have traditionally provided free transportation), and capacity (since grade schools must serve all eligible students, while institutions of higher education can adjust their own admission standards to suit their capacity). Moreover, even if construction and expansion decisions in the area of higher education *were* more complex, this would not justify the court's conclusion that it should therefore refuse entirely to consider whether such a decision adequately took account of the duty to disestablish the dual system of education.

Significantly, the one recent opinion[11] dealing with issues comparable to this that appellants have found, rejected

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[11] The only other comparable case plaintiffs have found is *Wynn* v. *Trustees of the Charlotte Community College System*, 122 S.E. 2d 404 (N.C.S.Ct. 1961), where the court held it was permissible for state funds to be used to build two separate colleges, noting that there was no evidence either college would exclude any student on the basis of race. The decision was not grounded on any distinction between higher and other education, but rather on the clearly outdated and invalid theory that *Brown* v. *Board of Education, supra,* did not require integration, but merely forbade the exclusion of students from the schools of their choice solely because of race.

the approach taken by the court below. In *Sanders* v. *Ellington*, 288 F. Supp. 937 (M.D. Tenn. 1968), an action was brought to prevent the University of Tennessee from constructing a new facility for expanding its evening course program at Nashville, also the location of the predominantly Negro Tennessee A & I State University; the court was also asked to order State officials to present a plan for the desegregation of the public universities of Tennessee. The court clearly held that there was "an affirmative duty . . . to dismantle the dual system of higher education which presently exists in Tennessee," and that an "open-door policy . . . alone does not discharge the affirmative duty . . . where, under the policy, there is no genuine progress toward desegregation and no genuine prospect of progress." The court therefore ordered the State defendants to submit "a plan designed to effect such desegregation of the higher educational institutions of Tennessee, with particular attention to Tennessee A & I State University, as to indicate the dismantling of the dual system now existing." (288 F. Supp. at 941, 942.) Significantly, the *Sanders* court noted factors mentioned by the court below here: the fact that colleges are neither compulsory nor free, and that students are not assigned but may choose where they will attend. But the *Sanders* court found these significant only to the extent they indicated that "the simple remedies which might be available to a county school board . . . are not available here," and warranted granting the defendants "a substantial amount of time for the submission of such a plan." (288 F. Supp. at 943.) Finally, while the *Sanders* court denied injunctive relief against the proposed construction, the opinion makes it clear that this is based on the particular facts of the case, *not* on any theory that the construction doctrine is inapplicable to higher education. Indeed, the court specifically points out that, "in reaching this decision that in-

junctive relief should be denied, I have not grounded it on the recent case of *Alabama State Teachers Association* v. *Alabama Public School and College Authority* . . . , involving the construction in Montgomery, Alabama, by Auburn University, a historically white institution, of a facility completely duplicating a historically Negro public college in that city." (288 F. Supp. at 942.)

II.

The Court Below Erred in Upholding the Proposed Construction of a Branch of Auburn University in Montgomery Where the Record Shows That It was Planned Without Regard to Disestablishment of the Dual System.

The proper role of a court, in reviewing decisions regarding new construction,[12] is to ensure that the State officials responsible for planning such construction gave proper consideration to the goal of desegregation. It is for these officials, not for the court, to make the initial assessment as

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[12] It is irrelevant whether the proposed college is characterized as a new institution in Montgomery or an expansion of the already existing institution. The label is unimportant. What is important is that any major change in the character of an institution in a dual system offers a fresh opportunity to channel that change in the direction of integrating the system. There can be no serious question that the Auburn Branch is a radical departure from any institutions heretofore existing in Montgomery. The University of Alabama Extension Center is basically a night school; it does not grant degrees; it has an enrollment of 400 or 500 students; its assets consist of one building worth about $225,000, equipment and furnishings, and a library which Auburn will only rent for the interim and which will later be moved to the main campus of the University of Alabama. In sharp contrast, the new institution is to be a degree-granting, daytime institution (which will also have evening courses); it will be a multimillion dollar college on an entirely new, large campus, with an eventual enrollment of 15,000 students.

to whether planned construction will adequately satisfy the duty to disestablish the dual system. In *United States* v. *Board of Public Instruction of Polk County, Florida*, 395 F.2d 66 (5th Cir. 1968), the Fifth Circuit discussed the necessity for the initial planning for construction by such officials to be made with reference to their obligation to disestablish the dual system:

> The appellee contends that inasmuch as the planning for the school was made without reference to race, there was no conscious effort on the part of the Board to perpetuate the dual system. This does not meet the requirements of the court order. There is an affirmative duty, overriding all other considerations with respect to the locating of new schools, except where inconsistent with "proper operation of the school system as a whole," to *seek* means to eradicate the vestiges of the dual system. It is *necessary* to give consideration to the race of the students. It is clear from this record that neither the state board nor the appellee sought to carry out this affirmative obligation, before proceeding with the construction of this already planned school. (395 F.2d at 69)

Further, the court in *Polk County* emphasized that where officials plan new construction without regard to their duty to disestablish the dual system, no retroactive assessment of the affect of the plan on the dual system, by the officials or by the court, can validate it.

> The United States contends that the school cannot be built at this location until the factors relating to possible steps assisting in eradicating the former dual system are evaluated by the Board having that responsibility. This has not been done. The conclusory

> expression of opinion by the superintendent of schools that in his judgment the location of this school, long since planned, without reference to the requirements of Jefferson, would meet those requirements, cannot substitute for the absence of a planning study and analysis made in such manner as to be subject to review by the district court that is required under the *Jefferson* ruling.
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> The decision as to what is possible without adversely affecting the proper operation of the school system as a whole must be made by the Board. It should be made in such manner as would permit the district court's review of the conclusion reached in order to determine whether the requirements of the decree have been fully understood and carried out. (395 F.2d at 69-70)

See also *Lee v. Macon County Bd. of Educ.*, 267 F. Supp. 458, 480-481, 489 (M.D. Ala. 1967); *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 877 (1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied*, 389 U.S. 840 (1967); *Broussard* v. *Houston Independent School District*, 395 F.2d 817, 822, 823, 824-26 (5th Cir. 1968) (Wisdom, J., dissenting.)

It is clear from the record in this case that, in all the conversations, meetings, and gathering of information that went into planning the establishment of a new institution of higher education in Montgomery, no consideration was given to the goal of furthering desegregation. See pp. 6-10, *supra*. No effort was made to involve members of the Negro community in the planning, or to design an institution responsive to their needs. No thought was given to expanding Alabama State rather than the University Center, or to coordinating with Alabama State in any

significant way, although these would have been obvious *possibilities*, meriting at least some consideration, had there been any concern with desegregation as a goal. And no efforts were made to attract a significant Negro student population to the proposed Auburn branch. Indeed to date recruitment efforts have been directed at white high schools to the complete exclusion of Negro high schools.

The opinion of the court below does not argue, as indeed it could not, that any consideration was given by appellants to disestablishment of the dual system in planning the Auburn branch. Instead the court proceeded to make its own assessment of the impact of the construction on disestablishment and concluded that "it is certainly as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve," and that "in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs." (App. 10a-11a, *infra.*) It is not clear that these statements constitute anything more than dicta, since the court noted that its review of the background of the case would "reveal the wisdom of [its] . . . conclusion" that courts ought not review construction decisions (App. p. 8a, *infra*). In any event, to the extent the court did make findings, it erred in imposing a burden on plaintiffs to prove that a particular alternative to the proposed Auburn branch would be more effective in disestablishing the dual system, and, indeed, in making any independent, retroactive assessment of the impact of the proposed plan on the dual system. Once plaintiffs had shown that in planning the proposed Auburn branch, defendants had not considered disestablishment of the dual system as a goal, the burden should have been placed on defendant offi-

cials to produce a new plan which did give adequate consideration to disestablishment. See pp. 19-21, *supra*.

Finally, even if the burden were properly placed on plaintiffs to prove that some alternative to the proposed Auburn branch would be more effective in disestablishing the dual system, we submit that this burden was satisfied. Under the proposed plan a traditionally white university was authorized to expand a traditionally white extension center to create a liberal arts college "completely duplicating a historically Negro public college in [Montgomery]," *Sanders* v. *Ellington*, 288 F. Supp. 937, 942 (M.D. Tenn. 1968). Not only would this proposed expansion fail to aid in the disestablishment of the dual system; it would perpetuate and reenforce that system, by removing presently existing economic and geographic pressures on white students in Montgomery to attend Alabama State. If instead the existing funds were used to expand and improve Alabama State, that college's capacity to attract white students would be much improved (see R. 843-44). The court below indicates that the Auburn branch would be at least as likely to become an integrated institution; but this ignores completely the fact that Alabama State would then in all likelihood remain a virtually all-Negro institution. While it is true that the development of Negro institutions of higher education into truly integrated institutions is rare,[13] it has taken place. West Virginia State College and Bluefield State College in West Virginia, and Lincoln University in Missouri are examples of historically Negro institutions which have become predominantly white.[14] Numerous other

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[13] See generally Jencks & Riesman, THE ACADEMIC REVOLUTION 469 (New York, 1968).

[14] *Id.*; McGrath, THE PREDOMINANTLY NEGRO COLLEGES AND UNIVERSITIES IN TRANSITION 12 (Institute of Higher Education, Columbia Univ., 1965).

traditionally Negro institutions of higher education have, since 1954, attracted significant numbers of white students.[15] Moreover, one of the reasons that such integration seldom does take place is because in most cities in the South where a predominantly Negro college exists, there also exists a predominantly white college and, where there does not, there is a tendency to create a new institution for the white community rather than expanding the existing Negro institution.[16]

In any event, expansion of Alabama State was not the only alternative presented for the court's consideration below. In their post-trial memorandum appellants suggested, for example, that the court might require that there be no duplication of courses being offered at Alabama State College by any new college established; or that any new college coordinate its programs in various areas with Alabama State. These and other alternatives are discussed, *infra*, pp. 26-28. What is significant here is that there were many alternatives available offering a greater likelihood of desegregation than the proposed plan.

The court below noted that at the hearing evidence was introduced showing that Auburn would be more suitable than Alabama State "because it could offer a wider range of courses, greater breadth and depth of faculty, and greater physical resources." (App. 11a, *infra*). But this does not support a conclusion that the creation of an independent, duplicative facility constitutes an appropriate decision from an educational point of view, completely apart from its effect on the dual system. McGrath, in his recent

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[15] See, *e.g.*, Clement, *The Historical Development of Higher Education for Negro Americans*, 35 J. Negro Educ. 299, 303-04 (1966). See also McGrath, *supra* n. 14, at 12.

[16] Jencks & Riesman, *supra* n. 13, at 470.

study of predominantly Negro colleges and universities, argues that the states:

> . . . ought not to maintain two systems of higher education, one for Negroes and one for other citizens. Quite aside from the legal and moral issues involved, segregation in higher education, as well as at other levels, is an economically wasteful and debilitating practice. More than others, the economically disadvantaged states where segregation is most widely practiced cannot afford to waste their limited resources as they now do in duplicating programs, facilities, libraries, and plant in two systems of higher education, one for Negroes and one for whites . . . . The maintenance of separate, segregated systems of higher education involves economic consequences which necessarily depreciate the entire educational program. (McGrath, *supra* n. 14 at 30).
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> What has been said about the waste in a duplication of services in nearby institutions applies with particular force to segregated units of the same state systems of higher education. (*Id.* at 140)

CONCLUSION

In conclusion we submit that appellants, having shown that the proposed Auburn branch was planned without any consideration to disestablishment of the dual system as a goal, are entitled to an injunction against the operation of Act No. 403, and against the construction or expansion of any higher educational facilities until such time as defendants produce for the court's approval a plan which properly takes into account the obligation to disestablish the dual system.

While it is neither necessary or appropriate at this point for this Court, or for the court below, to require any particular alternative to the proposed Auburn branch, the Court can and should require that appellants, in the course of developing a plan, seriously consider and explore the following alternatives which, we submit, offer far more promise of producing a unitary, non-racial system than the proposed Auburn branch, while at the same time avoiding wasteful duplication of public facilities for higher education in the City of Montgomery.

1. *Expansion of Alabama State College.*

As indicated *supra,* pp. 23-24, expansion of Alabama State College is at least an alternative which deserves serious consideration. Appellants should, for example, consider what affect the proposed infusion of funds would have on the ability of Alabama State to provide for the educational needs of the entire Montgomery community. In addition, appellants should consider the extent to which a change in name, an increase in white faculty members, active recruitment of students in the white community, and other similar efforts would enable Alabama State to attract an integrated student body.

2. *Development of a new college in Montgomery in coordination with the gradual phasing out of Alabama State College.*

Appellants recognize the difficulty that Negro state colleges, whose traditional functions were to provide training in teaching and the agricultural and mechanical arts, may have in developing into first-rate educational institutions, capable of attracting first-rate students.[17] To the extent that this is true in the particular instance, it offers some support for the establishment of a new institution in Mont-

[17] See generally Jencks & Riesman, *supra,* n. 13, at 428-444, 472-73; *but see* McGrath, *supra,* n. 14, at 5, for a less critical view.

gomery, designed to serve the higher educational needs of the Negro, as well as the white community, and ultimately to supplant Alabama State College.[18] Such a plan should presumably envision special remedial and compensatory programs at the new institution, as well as special recruitment efforts in the Negro community,[19] to ensure that the new institution would in fact serve the needs of the entire community, Negro as well as white.

3. *Merger of the proposed Auburn branch with Alabama State College.*[20]

Merger might well be an appropriate alternative in view of the similarity of the programs of the proposed Auburn branch and of Alabama State, and the apparent strength of many of Alabama State's programs.

Under either this or alternative No. 2, listed above, a variety of cooperative arrangements might be worked out for the transition period.[21] For example, arrangements might be worked out whereby facilities such as libraries and special equipment were shared; programs in different fields were coordinated and presented on a joint basis; courses at one institution were open to the other's students, etc.

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[18] See Jencks & Riesman, *supra*, n. 13, at 475. *But see* McGrath, *supra* n. 14, at 6.

[19] See, *e.g.*, Plaut, *Plans for Assisting Negro Students to Enter and Remain in College*, 35 J. Negro Educ. 393 (1966); Wiggins, *Dilemmas in Desegregation in Higher Education*, 35 J. Negro Educ. 430, 435-36 (1966).

[20] See McGrath, *supra* n. 14, at 6, 24; Pettigrew, *A Social Psychological View of the Predominantly Negro College*, 36 J. Negro Educ. 274, 282, 283 (1967).

[21] See generally McGrath, *supra* n. 14, at 101, 140 ff.; Branson, *Interinstitutional Programs for Promoting Equal Higher Educational Opportunities for Negroes*, 35 J. Negro Educ. 469 (1966); Patterson, *Cooperation Among the Predominantly Negro Colleges and Universities*, 35 J. Negro Educ. 477 (1966).

4. ***Development of Alabama State College and any new institution as complementary institutions with different functions.***

Such a plan might, for example, prohibit the new institution from offering the kinds of programs currently available at Alabama State; or it might provide for the development of Alabama State as an institution providing pre-college preparation and vocational training, leaving to the new institution the establishment of a broad liberal arts and professional program on the college level.

As noted above, we do not feel that this Court, or the court below, need decide *what* alternative is the appropriate one. We suggest the above simply to indicate the variety of promising alternatives that exist. And we submit, in sum, that all construction and expansion under Act No. 403 should be enjoined until defendants have seriously considered and explored these and other alternatives, and have submitted for the court's approval a plan which properly takes into account the obligation to disestablish the dual system of higher education in Alabama.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion and Judgment Below

IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

CIVIL ACTION No. 2649-N

ALABAMA STATE TEACHERS ASSOCIATION, a corporation; ALVIN A. HOLMES; WILLIAM SANKEY; ALBERT HARRIS; SYLVESTER PRESSLEY; and JOE L. REED, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY, a corporation; ALBERT P. BREWER, individually and as President of the Authority; ERNEST STONE, individually and as Vice President of the Authority; ROBERT B. INGRAM, individually and as Secretary of the Authority; AGNES BAGGETT, individually and as Treasurer of the Authority; and E. L. WYNN, M. H. MOSES, PAUL S. HOLLEY, R. C. BAMBERG, REDUS COLLIER, JOHN W. OVERTON, JOHN PACE, III, SIM A. THOMAS, ROBERTS H. BROWN, and FRANK P. SAMFORD, as members of the Board of Trustees of Auburn University, and THE BOARD OF TRUSTEES OF AUBURN UNIVERSITY,

Defendants.

Before GEWIN, Circuit Judge, and JOHNSON and PITTMAN, District Judges.

Appendix A

JOHNSON, District Judge:

The plaintiffs in this class action seek to prevent the State of Alabama from constructing and operating a four-year, degree-granting extension of Auburn University in the City of Montgomery, Alabama. Plaintiffs originally sought a declaratory judgment as to the invalidity of and an injunction against any action under or pursuant to Alabama Act No. 243 of 1965 and Alabama Act No. 403 of 1967.[1]

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[1] Alabama Act No. 243 of 1965 authorizes the formation of the Alabama Public School and College Authority, a public corporation, having the power, among other things, "to provide for the construction, reconstruction, alteration and improvement of public buildings and other facilities for public educational purposes in the State, including the procurement of sites and equipment therefor; to anticipate by the issuance of its bonds the receipt of the revenues" from those portions of the state sales tax and state use tax that are required to be paid into the Alabama Special Educational Trust Fund by issuing bonds solely out of and secured by a pledge of the said portions of those excise taxes. The Act authorizes the Authority to issue and sell bonds not exceeding $116,000,000 in aggregate principal amount and provides for the allocation of proceeds from the sale of the bonds, in the amounts specified therein, to educational institutions (including Auburn University) named in Section 10 of the Act. Section 10 identifies some of these institutions as "Negro."

Alabama Act No. 403 of 1967 authorizes the Alabama Public School and College Authority to issue and sell bonds in the principal amount of $5,000,000 in addition to all other bonds theretofore issued or authorized to be issued by the Authority, the net proceeds of which "shall be distributed to Auburn University to be used by the board of trustees thereof for construction and equipment of physical facilities for conducting a four-year college or branch of the University in the City of Montgomery and for the support and maintenance of such college for each of the fiscal years ending September 30, 1968 and September 30, 1969."

While originally alleging that both acts were unconstitutional as being racially discriminatory and that Act No. 243 was unconstitutional "on its face and as applied," plaintiffs at the beginning

Appendix A

Jurisdiction is invoked pursuant to 28 U.S.C. §1343 and 28 U.S.C. §1331. Plaintiffs seek a declaratory judgment that Act No. 403 of 1967 is unconstitutional and also seek an injunction against the enforcement, operation and execution of the said act. A three-judge court was convened to hear this cause pursuant to 28 U.S.C. §§2281, 2284.

The defendant Alabama Public School and College Authority is a corporation formed by the defendants the Governor, the State Superintendent of Education, and the Director of Finance pursuant to Alabama Act of 1965 No. 243. Defendant is authorized, *inter alia,* "from time to time to sell and issue its bonds, not exceeding One hundred sixteen million dollars ($116,000,000) in aggregate principal amount, for the purpose of providing funds for construction, reconstruction, alteration and improvement of buildings and other facilities for public educational purposes in the State. . . ." Alabama Acts 1965, No. 243, §8. Section 10 of the Act sets out detailed appropriations of the authorized monies to the various public colleges. Alabama Acts 1967 No. 403 authorizes the defendant Authority to issue and sell additional bonds in the principal amount of $5,000,000 for the purpose of constructing, equipping, establishing, creating, supporting and maintaining a four-year college at Montgomery under the supervision and control of defendant Board of Trustees of Auburn University.

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of the hearing on the merits of this case announced an abandonment of their challenge to Act No. 243:

> "Mr. Gray: If it please the Court, the plaintiffs do not insist and do not urge upon the Court at this time to declare unconstitutional Act Number 243, which was adopted on May 4, 1965, creating the Alabama Public School and College Authorities . . ."

Appendix A

Plaintiff Alabama State Teachers Association is a non-profit corporation whose membership consists of approximately 10,000 Negro teachers, a majority of whom are graduates of Alabama State College, located in Montgomery, Alabama, and many of whom are instructors and teachers at state-supported Negro colleges and schools in Alabama. Additional plainitffs are Negro students and alumni of Alabama State College and the Executive Secretary of Alabama State Teachers Association.

This cause is now submitted upon the pleadings, several motions to dismiss and supporting briefs, the testimony of numerous witnesses and accompanying exhibits and post-trial memoranda.

The plaintiffs first contend that Act No. 243 designates certain of the schools named therein for use by members of that class or race of persons commonly referred to as Negroes. Racial classifications are always suspect and subject to the most rigid scrutiny and in most cases are irrelevant to any acceptable legislative purpose. *Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). We do not reach the issue, however, because plaintiffs claim no injury due to and request no relief from the operation of that statute. We will, however, as plaintiffs request, consider the racial classification set forth in Act No. 243 for whatever evidentiary weight it may have on the question of the constitutionality of Act No. 403.

Plaintiffs' challenge to Act No. 403 proceeds on two grounds. First they argue that to the extent that this act authorizes the sale of bonds and the distribution of the proceeds thereof to Auburn University to be used for the "support and maintenance" of such college for each

of the fiscal years ending September 30, 1968 and September 30, 1969, Act No. 403, when read in conjunction with §11 of Act No. 243, constitutes "a pledge of revenues of future fiscal years for the purpose of obtaining funds with which to meet current operating expenses," and therefore contravenes Constitution of Alabama of 1901, Art. 11, §213.

This allegation raises a question of state law, a question which by itself would not support the jurisdiction of a federal court. While pendent jurisdiction over the state law claim might be said to exist because the claim also presents a substantial federal question, *Brown & Root, Inc.* v. *Gifford Hill & Co.*, 319 F.2d 65 (5th Cir. 1963); 1 Barron and Holtzoff, Federal Practice and Procedure §23 (1960); this seems to be a case where that jurisdiction should be declined. *Sunbeam Lighting Company* v. *Pacific Associated Lighting, Inc.*, 328 F.2d 300 (9th Cir. 1964); *Strachman* v. *Palmer*, 177 F.2d 427 (1st Cir. 1949); 5 A.L.R. 3d 1040, 1058. Neither of the parties has expended energy on this issue; thus, because it has not been given a full adversary airing, this issue, with repercussions far beyond this case, is hardly ripe for determination by this Court. Plaintiffs' claim on this issue is dismissed without prejudice to their proceeding in an appropriate state court.

Plaintiffs' primary attack on Act No. 403 may be stated as a syllogism: Alabama historically has had a dual system of higher education by law; although no longer supported by law, the dual system in fact remains largely intact; this Court and the Fifth Circuit recognize in the elementary and secondary education area an affirmative duty to dismantle the dual system, *Lee* v. *Macon County Board of Education*, 267 F. Supp 458 ((M.D. Ala. 1967), *aff'd* 389

U.S. 215 (1967), *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (1966); *aff'd en banc* 380 F.2d 385 (5th Cir. 1967), *cert. denied* 389 U.S. 840 (1967); that duty is equally applicable to higher education; that duty requires officials to utilize new construction or expansion of facilities as an opportuniy to dismantle the dual system; the history and operation of Acts Nos. 243 and 403 indicate that in planning the construction of the Auburn branch at Montgomery defendants did not maximize desegregation; therefore, their action is unconstitutional and should be enjoined.

At the outset it should be noted that this argument presents a case of first impression. To our knowledge, no court in dealing with desegregation of institutions in the higher education area has gone farther than ordering nondiscriminatory admissions. That is also as far as Congress went in the 1964 Civil Rights Act.[2] The Department of Health, Education and Welfare has also largely limited its concern to admissions policies in administering Title 6 of the 1964 Civil Rights Act.[3]

We too are reluctant at this time to go much beyond preventing discriminatory admissions. Although much of plaintiffs' argument is valid, several faulty premises lead us to reject the conclusion they urge upon us. We would judicially notice that Alabama has traditionally had a dual system of higher education. Furthermore, we find

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[2] 42 U.S.C. §2000c-4(a)(2). Compare subsection (2) with subsection (1), which seems to authorize a wider range of civil action by the Attorney General in the elementary and secondary school area.

[3] 45 C.F.R. §80.4(d). Compare subsection (d) with subsection (c), which for elementary and secondary schools requires a plan for desegregation. Pursuant to this, H.E.W. has compiled an elaborate set of guidelines. See 45 C.F.R. §181 (1967).

as a fact that the dual system in higher education has not been fully dismantled. The law is clear also that the State is under an affirmative duty to dismantle the dual system. Indeed, in *Lee* v. *Macon County Board of Education, supra,* we required the state colleges and junior colleges to refrain from discrimination in admissions and to begin faculty desegregation. We do not agree, however, with the characterization of the college authorities' conduct, nor do we agree that the *scope* of the duty should be extended as far in higher education as it has been in the elementary and secondary public schools area.

Plaintiffs fail to take account of some significant differences between the elementary and secondary public schools and institutions of higher education and of some related differences concerning the role the courts should play in dismantling the dual systems. Public elementary and secondary schools are traditionally free and compulsory. Prior to "freedom of choice," children were assigned to their respective schools. This could be done with equanimity because, in principle at least, one school for a given grade level is substantially similar to another in terms of goals, facilities, course offerings, teacher training and salaries, and so forth. In this context, although reluctant to intervene, when the Constiution and mandates from the higher courts demanded it, we felt that desegregation could be accomplished, and that the requirements of the law would be met, without our being involved in a wide range of purely educational policy decisions. Accordingly, we felt, in dealing with the problem of desegregating the elementary and secondary public schools, that we could and should review decisions concerning the impact of site selection for new construction or expansion without overreaching our area of competence.

Appendix A

Higher education is neither free nor compulsory. Students choose which, if any, institution they will attend. In making that choice they face the full range of diversity in goals, facilities, equipment, course offerings, teacher training and salaries, and living arrangements, perhaps only to mention a few. From where legislators sit, of course, the system must be viewed on a statewide basis. In deciding to open a new institution or build a branch or expand an existing institution, and in deciding where to locate it, the legislature must consider a very complicated pattern of demand for and availability of the above-listed variables, including, also, impact on the dual system. We conclude that in reviewing such a decision to determine whether it maximized desegregation we would necessarily be involved, consciously or by default, in a wide range of educational policy decisions in which courts should not become involved. A brief review of the background of this case will, we think, reveal the wisdom of this conclusion.

At the present time there are four institutions of higher learning in Montgomery: two private—Huntingdon College and Alabama Christian College—and two public—Alabama State College and the University of Alabama Montgomery Extension Center. The Center does not grant degrees; its offerings are similar to those of a junior college. Alabama State is a predominantly Negro four-year liberal arts college with an emphasis on education of teachers.

Interest in another state-supported institution in Montgomery was initially generated in the local Chamber of Commerce. A committee was appointed to determine the need for such a school. Having determined that the need existed, they proceeded to investigate ways and means.

Appendix A

Apparently it was assumed from the beginning that expansion of the Alabama Extension Center was the way to proceed. Thus, University of Alabama officials were approached to discuss their willingness to undertake an expansion. The University determined that it had sufficient commitments with other branch expansions. At that point, Auburn University was approached and it agreed to undertake the project. The University of Alabama agreed to cooperate in the transition from the University Center to the new operation. A Montgomery legislative delegation was then successful in securing a legislative appropriation for the project. Prior to this litigation a vice president for the Auburn branch was nominated. He submitted an academic plan that projected a long-range enrollment of 15,000 students. Current plans call for undergraduate majors in Liberal Arts, Business, and Teacher Education, as well as graduate work in appropriate areas, *e.g.*, Education, Business Administration, and Political Science.

Plaintiffs make a number of contentions concerning this history. They maintain that the reason for having a new college in Montgomery was to provide for white students in the area. To the extent that this may mean "to provide for white students only," the record does not bear them out. Plaintiffs rely heavily upon testimony that 137 students commuted from Montgomery County for the purpose of attending the Alexander City State Junior College located at Alexander City, Alabama, although Montgomery County is not supposed to be in that school's geographic area. However, it is noted that 12 of those 137 students are Negroes, and there is nothing in the record now before this Court to indicate that those Negroes, if they so desire, will not be absorbed into the new Auburn

branch in Montgomery along with other Negroes and whites.

Plaintiffs further contend that inadequate consideration was given to how the proposed Auburn branch might be operated so as to eliminate the dual school system and that, because of this, the new college has become and will continue to be an identifiably "white" institution. This contention is based partly on the assertion that Auburn University is an identifiably "white" institution. In a sense that is so, but in that sense nearly every existing institution is "identifiable." If such identity precludes expansion, none could expand. Plaintiffs' contention that inadequate attention was given to desegregation is also based on defendants' failure to give serious consideration to expanding Alabama State College as an alternative to establishing the Auburn branch. But this argument overlooks the fact that Alabama State is at least as identifiably "black" as Auburn is identifiably "white." In terms of eliminating the dual school system, one label is no more preferable than the other.

We thus reject plaintiffs' conclusion that, when the new college is put into operation, Montgomery will have two colleges—one Negro, one white. As plaintiffs themselves indicate: "In terms of anything heretofore existing in Montgomery, the Auburn branch will be for all practical purposes a 'new institution.'" It is certainly as reasonable to conclude that a new institution will not be a white school or a Negro school, but just a school, as it is to believe that Alabama State would so evolve.

Much of the above discussion is based on speculation; this is necessarily true because much of plaintiffs' argument is based on speculation. However, the discussion

does serve to show that in the discharge of the duty to maximize desegregation, the Auburn branch is at least arguably as acceptable as any alternative proffered by plaintiffs.

Defendants apparently did not seriously evaluate Alabama State College's potential as an alternative. But at the hearing evidence was introduced that tended to show that Auburn would be more suitable for the purposes envisioned because it could offer a wider range of courses, greater breadth and depth of faculty, and greater physical resources. It was also considered important by the educator witnesses that Auburn had higher admission and transfer requirements. Some evidence that the preference for Auburn's offerings over those of Alabama State was based on educational grounds is the fact that defendants rejected an offer to operate the branch from Troy State University, an institution not unlike Alabama State except that it is larger and is traditionally predominately white.

Auburn University has been ordered by this Court to admit all qualified Negroes on terms consistent with the equal protection clause of the Fourteenth Amendment. *Franklin* v. *Parker*, 223 F. Supp. 724 (M.D. Ala. 1963), *modified* and *aff'd* 331 F.2d 841 (5th Cir. 1964). It would appear that Auburn has abided and will continue to abide by that order in good faith. Testimony indicated that it has recruited and is continuing to recruit more Negro faculty members.

We conclude, therefore, that as long as the State and a particular institution are dealing with admissions, faculty and staff in good faith the basic requirement of the affirmative duty to dismantle the dual school system on the college level, to the extent that the system may be based upon racial considerations, is satisfied.

This is not to suggest that we view the problem as merely personal rather than systematic. As plaintiffs indicated, nondiscriminatory admissions in higher education are analogous to a freedom-of-choice plan in the elementary and secondary public schools. We are also cognizant that recent Supreme Court decisions[4] have cast doubt on the continued viability of freedom of choice in the public schools. But we do not interpret those decisions as applying to the operation of an education system on a college level. Freedom to choose where one will attend college, unlike choosing one's elementary or secondary public school, has a long tradition and helps to perform an important function, *viz.*, fitting the right school to the right student.

We believe that an effective beginning has been made at Auburn to dismantle the racial characteristics of that school system and that, as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education. If the Auburn branch at Montgomery is administered as "just a school," as we are assured it will be and as we are confident it will be, our conclusions as herein outlined will receive significant confirmation.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the challenged statute, Alabama Act No. 403, 1967 Legislature, is not unconstitutional on its face or as applied to plaintiffs; it is further ORDERED that the relief

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[4] *Green* v. *County School Board of New Kent County*, 36 U.S.L. Week 4476 (U.S. May 27, 1968), and the companion cases *Monroe* v. *Board of Commissioners of the City of Jackson*, 36 U.S.L. Week 4480, and *Raney* v. *Board of Education of Gould School District*, 36 U.S.L. Week 4483.

herein sought by plaintiffs be and the same is hereby denied.

It is further ORDERED that the costs in this proceeding be and they are hereby taxed against the plaintiffs, for which execution may issue.

Done, this the 26th day of July, 1968.

WALTER P. GEWIN
United States Circuit Judge

FRANCIS JOHNSON
United States District Judge

VIRGIL PITTMAN
United States District Judge

APPENDIX B

RACIAL IDENTITY OF STUDENTS AT STATE SENIOR COLLEGES AND UNIVERSITIES IN ALABAMA, FALL, 1967

Name of Institution	*Students Enrolled by Race*	
	White	*Negro*
Alabama A. & M.	15	1,960
Alabama State	2	1,731
Florence	2,938	67
Jacksonville	4,988	38
Livingston	1,296	17
Troy	3,820	62
Total	13,059	3,875

[Taken from Part I of P-1 to Dr. Stone's Deposition, R. 693, App. D, *infra* p. 17a]

Auburn University

	White	*Negro*
Undergraduate	11,979	28
Graduate	1,114	13
	13,093	41

[Taken from P-1 to Dr. Philpott's Deposition, R. 105, 106]

	White	*Negro*
University of Alabama	14,706	193
Alabama College	2,451	2
University of South Alabama	3,084	150

(Undergraduate Enrollment Only)

[Taken from App. C, *infra*]

APPENDIX C

The following material represents part of a summary of estimates submitted in compliance reports by most colleges and universities to the U. S. Office for Civil Rights for the fall of 1967 as reprinted in *The Chronicle of Higher Education,* April 22, 1968.

WHITE, NEGRO UNDERGRADUATES AT COLLEGES ENROLLING 500 OR MORE, AS COMPILED FROM REPORTS TO U.S. OFFICE FOR CIVIL RIGHTS

Alabama	*White*	*Negro*	*Other*
Alabama A&M C	4	1,884	0
Alabama C	2,451	2	5
Alabama St C	2	1,732	0
Alexander City St JC	852	24	0
Auburn U	11,979	28	24
Birmingham Southern C	1,049	19	0
Enterprise St JC	817	30	2
Gadsden St JC	2,080	54	0
Geo C Wallace St JC	652	16	1
Huntington C	937	2	0
Jacksonville St U	4,884	37	13
Jefferson St JC	3,437	163	1
John C. Calhoun St JC	1,401	72	0
Livingston St C	1,300	20	8
Miles C	1	1,024	0
Mobile St JC	0	749	0
Northeast Ala St JC	755	0	0
Oakwood C	3	620	3
St Bernard C	783	1	2
Spring Hill C	1,011	42	2
Stillman C	2	709	2
Troy St C	2,833	9	0

Appendix C

Alabama	*White*	*Negro*	*Other*
Tuskegee Inst	26	2,885	127
U of Alabama	14,706	193	35
U of South Alabama	3,084	150	2
Wenonah St JC	0	702	0
Wm L Yancey St JC	973	20	2

APPENDIX D

[Taken from P-1 to Dr. Stone's Deposition, R. 693]

RACIAL IDENTITY OF STUDENTS AND FACULTY MEMBERS OF JUNIOR COLLEGES, TRADE SCHOOLS AND COLLEGES UNDER SUPERVISION AND CONTROL OF THE ALABAMA STATE BOARD OF EDUCATION, FIRST QUARTER OR FIRST SEMESTER, 1967-68[1]

	Students Enrolled by Race				*Teaching Staff by Race*			
Name of Institution	*White*	*Negro*	*Other*	*Total*	*White*	*Negro*	*Other*	*Total*
I. *Senior Colleges*								
Alabama A. & M.	15	1,960	1	1,976	12	90	8	110
Alabama State	2	1,731	0	1,733	2	75	8	85
Florence	2,938	67	2	3,007	187	2	0	189
Jacksonville	4,988	38	18	5,044	164	3	6	173
Livingston	1,296	17	2	1,315	60	0	0	60
Troy	3,820	62	23	3,905	159	2	1	162
Total	13,059	3,875	46	16,980	584	172	23	779
II. *Junior Colleges*								
Alexander City	932	26	0	958	40	0	0	40
John C. Calhoun	1,401	72	0	1,473	69	0	0	69
Jefferson Davis	486	31	0	517	18	0	0	18
Enterprise	814	30	3	847	36	0	0	36
Gadsden	2,089	54	0	2,143	93	0	0	93
Patrick Henry	346	20	0	366	19	0	0	19
Jefferson State	3,432	163	1	3,596	173	0	0	173
Mobile	0	790	0	790	2	31	1	34
Northeast Alabama	753	0	0	753	33	0	0	33
Northwest Alabama	484	5	0	489	22	0	0	22
Snead	405	0	0	405	26	0	0	26
Southern Union	459	12	1	472	26	0	0	26
George C. Wallace	665	16	1	682	34	0	1	35
Wenonah	0	702	0	702	1	37	0	38
William L. Yancey	975	20	3	998	40	0	0	40
Total	13,241	1,941	9	15,191	632	68	2	702

[1] Information not available prior to 1967-68. No information available on administrative personnel.

Name of Institution	Students Enrolled by Race				Teaching Staff by Race			
	White	Negro	Other	Total	White	Negro	Other	Total
III. *Trade Schools*								
Ala. Inst. of Avia. Tech.	260	4	0	264	20	1	0	21
Ala. School of Trades	1,131	9	1	1,141	32	0	0	32
Harry M. Ayers	245	27	2	274	16	0	0	16
Bessemer	381	111	0	492	28	0	0	28
John C. Calhoun	583	34	0	617	44	0	0	44
Carver	0	172	0	172	0	17	0	17
J. F. Drake	2	172	0	174	1	18	0	19
Gadsden	2	174	0	176	0	13	0	13
Richmond P. Hobson	152	1	0	153	13	0	0	13
J. F. Ingram	358	200	0	558	17	1	0	18
William Rufus King	170	7	0	177	14	0	0	14
Douglas MacArthur	241	13	0	254	20	1	0	21
Muscle Shoals	164	27	0	191	15	0	0	15
Northwest Alabama	290	3	0	293	23	0	0	23
N. F. Nunnelley	182	39	0	221	15	1	0	16
Opelika	439	56	0	495	31	0	0	31
John M. Patterson	313	8	0	321	26	0	0	26
Ed E. Reid	180	23	0	203	10	0	0	10
Shelton	321	18	1	340	28	0	0	28
Southwest State	509	13	2	524	35	0	0	35
Sparks	165	33	0	198	13	0	0	13
Councill Trenholm	0	556	0	556	1	17	0	18
Tuscaloosa	0	192	0	192	0	13	0	13
Walker County	169	25	0	194	16	0	0	16
George C. Wallace (Dothan)	348	41	0	389	30	0	0	30
George C. Wallace (Cullman)	166	3[2]	0	169	13	0	0	13
Wenonah	0	291	0	291	0	23	0	23
Total	6,771	2,252	6	9,029	461	105	0	566
GRAND TOTAL	33,071	8,068	61	41,200	1,677	345	25	2,047

[2] Applied but not enrolled as of date report was made.

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In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 731

ALABAMA STATE TEACHERS ASSOCIATION, et al.,
Appellants,

vs.

ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY, et al.,
Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

MOTION TO AFFIRM

Appellees, Alabama Public School and College Authority, a Corporation; Albert P. Brewer, individually and as President of the Authority; Ernest Stone, individually and as Vice President of the Authority; Robert B. Ingram, individually and as Secretary of the Authority; and Agnes Baggett, individually and as Treasurer of the Authority, move that the final Judgment and Decree of the three-judge District Court be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument, and on the further ground that the judgment and decree are correct.

STATEMENT OF THE CASE

The Alabama Legislature authorized the Alabama Public School and College Authority to issue and sell bonds in the principal amount of $5,000,000. Act No. 403, General Acts of Alabama 1967, page 1016.

By Section 2 of the Act the net proceeds of the sale of the bonds "shall be distributed to Auburn University to be used by the Board of Trustees thereof for construction and equipment of physical facilities for conducting a four-year college or branch of the University in the City of Montgomery and for the support and maintenance of such college for each of the fiscal years ending September 30, 1968, and September 30, 1969."

Appellants sought a declaratory judgment that Act No. 403 of the 1967 Legislature is unconstitutional and also prayed for injunctive relief against the enforcement, operation, and execution of the Act. A three-judge court was convened to hear the cause pursuant to 28 U.S.C., Sections 2281, and 2284.

It is contended by appellants that the Act in its application perpetuates segregation by establishing an extension or branch of the University in Montgomery, Alabama.

In an amendment to the complaint, appellants also claim that if any new institution of higher learning is to be situated in or near Montgomery that it should be under the supervision and control of Alabama State College, a predominantly Negro institution specializing in "Teacher Education."

The opinion in this case was written for the three-judge Court by District Judge Frank M. Johnson, Jr., and concurred in by Circuit Judge Walter P. Gewin and District Judge Virgil Pittman. Act No. 403 was declared not to be unconstitutional on its face or as applied.

This appeal followed and appellants jurisdictional statement has been filed.

ARGUMENT

Under "Questions Presented" in the jurisdictional statement, the first is "Does the State have an affirmative duty

to disestablish a dual system of higher education based upon race?"

The answer to this question is stated in the present opinion, as follows:

> "The law is clear also that the State is under an affirmative duty to dismantle the dual system. Indeed, in *Lee vs. Macon County Board of Education*, supra, we required the state colleges and junior colleges to refrain from discrimination in admissions and to begin faculty desegregation."

As to appellants' contention that the reason for having the extension in Montgomery was to provide for white students in the area, the court said, "To the extent that this may mean to provide for white students only, the record does not bear them out."

The second and last question presented by appellants is stated as follows:

> "Where the record shows that the proposed construction by a predominantly white university of a college in Montgomery duplicating an existing, virtually all-Negro college, was planned without regard to its effect upon the disestablishment of the dual system, was it proper for the court to deny injunctive relief?"

In the first place, it is erroneous to assume "duplication."

Dr. Watkins, President of Alabama State College, testified that his institution "specializes in Teacher Education."

Dr. Philpott, President of Auburn, observed that Auburn has a wide range of programs and faculty resources, and that Alabama State College did not have the range of programs that Auburn has. An illustration was that in business ad-

ministration courses, an important area at Auburn was computer science (p. 36, Dr. Philpitt's deposition).

Secondly, Auburn University is an integrated institution both as to students and faculty (pp. 12, 14, Dr. Philpott's deposition).

It is our belief that the location of the extension of Auburn in Montgomery will from the evidence presented result in greater Negro attendance and increased Negro faculty employment at Auburn.

Negroes are now attending several predominantly white schools away from Montgomery; for instance, Alexander City State Junior College, located at Alexander City, Alabama. Although Montgomery County is not supposed to be in that school's geographic area, 12 Negro students from the Montgomery area are attending that Junior College. As to this, the District Court said:

> "However, it is noted that 12 of these 137 students are Negroes, and there is nothing in the record now before this Court to indicate that these Negroes, if they so desire, will not be absorbed into the new Auburn branch in Montgomery along with other Negroes and whites."

Then concluding, the court said:

> "We believe that an effective beginning has been made at Auburn to dismantle the racial characteristics of that school system and that, as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education. If the Auburn branch at Montgomery is administered as 'just a school,' as we are assured it will be, and we are confident it will be, our conclusions as herein outlined will receive significant confirmation."

CONCLUSION

As to expanding Alabama State College as an alternative to establishing the Auburn branch, Alabama State is at least as identifiably "black" as Auburn is identifiably "white." As said by the court, "In terms of eliminating the dual school system, one label is no more preferable than the other."

There are no substantial questions presented for this court's consideration; the case was carefully considered and correctly decided in the court below.

Needed higher education facilities for both Negroes and whites should no longer be delayed.

It is respectfully submitted that the judgment and decree should be affirmed.

MacDONALD GALLION, As
Attorney General of the
State of Alabama

Gordon Madison

GORDON MADISON, As
Assistant Attorney General of the
State of Alabama
Attorneys for said Appellees

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Motion to Affirm has been served upon the following attorneys for appellants by mailing a copy thereof

to each, postage prepaid and airmail where proper, on this the 7th day of November, 1968:

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No. 731

In the Supreme Court of the United States

OCTOBER TERM, 1968

ALABAMA STATE TEACHERS ASSOCIATION, ET AL.,

APPELLANTS,

v.

ALABAMA PUBLIC SCHOOL AND

COLLEGE AUTHORITY, ET AL.,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

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In the Supreme Court of the United States

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APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MOTION TO AFFIRM

Appellees, Members of the Board of Trustees and The Board of Trustees of Auburn University, pursuant to Rule 16 of the Revised Rules of The Supreme Court of The United States, move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion, judgment and decree of the three-judge District Court from which this appeal is taken (R. 695) is reported at 289 F. Supp. 784.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1253.

QUESTION PRESENTED

Whether the District Court erred in denying an injunction to prevent the expansion, establishment, and operation at Montgomery, Alabama, of a branch of Auburn University, a fully accredited, large and broad-based state supported university, which branch would provide needed educational resources and opportunities on a nondiscriminatory basis to students, white and Negro; and in holding that the statute providing initial funds for such a branch was not unconstitutional on its face or as applied to Appellants.

STATEMENT

This is a direct appeal from the final judgment and decree entered on July 26, 1968, by a three-judge Court convened to hear the cause pursuant to 28 U. S. C. § § 2281 and 2284.

The complaint sought to prevent the establishment at Montgomery, Alabama, of a branch of Auburn University (R. 1-23). At the beginning of the hearing on the merits on May 2, 1968, counsel for Appellants specifically abandoned all challenges to the constitutionality of the funding and enabling statute except "the constitutionality" of Alabama Act 403, Regular Session, 1967, "as it applies" (R. 708).

Hearing of testimony and receipt of depositions and exhibits was completed on May 2, 1968, and the cause was taken under submission (R. 927). On July 26, 1968, the three-judge Court handed down its unanimous opinion, judgment, and decree, holding that the challenged Act "is not unconstitutional on its face or as applied to plaintiffs," and denying the relief sought by plaintiffs (R. 695-703). This appeal, and an appeal to the United States Court of Appeals for the Fifth Circuit, followed (R. 933, 935).

ARGUMENT

The decision of the three-judge District Court is plainly correct. It held that, on the record made, the funding and establishment of a branch of Auburn University in Montgomery, Alabama, was not unconstitutional. The unanimous opinion of the three-judge Court evinces careful study, detailed analysis, and a full consideration of the testimony heard orally by the Court and the lengthy depositions and voluminous exhibits presented at the hearing.

The record is wholly lacking in any evidence to substantiate Appellants' unsupported claims that the take over of the University of Alabama Center in Montgomery by Auburn University, and its expansion into a full-blown, degree-granting, branch of Auburn University would somehow amount to racial discrimination. The Court observed (R. 701) that the Auburn Branch in Montgomery is not designed to be, and will

not be, a white school or a Negro school, *"but just a school."*

The establishment of the Auburn Branch at Montgomery "is by no means unique, but rather is consistent with a definite trend of the last few decades in American higher education whereby institutions more and more are bringing to large population centers the kind of academic opportunities and educational vigor so vital to the cultural, professional and business components of our developing urban life." (From Plaintiffs' (Appellants) Exhibit 1 to Deposition of Holman Head, R. 191, R. 273).[1]

It is a common practice throughout the country for large public colleges and universities to make their programs available where the need exists.[2] The need is determined by the Legislative Branch and imple-

[1] "There are more than 250 such permanent branches of State Universities and land-grant colleges in the United States. Along with community and junior colleges, these institutions are making it possible and practical for thousands of students to continue their education beyond high school by bringing college within easier reach.

"As Herman B. Wells, chancellor of Indiana University and its president for 25 years, recently stated, 'branch campuses are a good idea because they are fully integrated into the parent institution and gain the benefits of close association with the larger establishment, sharing its resources, prestige, and academic maturity, while developing as a smaller and more locally oriented educational institutions'."

(Plaintiffs' (Appellants) Exhibit 1 to Head Deposition, R. 191, R. 273).

[2] "A good example of this was the 1966 decision of the U. S. Congress to establish a new college in Washington, D. C. to be known as City Federal College. This new public institution will open in September and has been appropriated $40 million for the site and construction costs. This new college was established by

mented by University Administrations. Cf. *Berman v. Parker*, 348 U. S. 26, 33, a case involving the District of Columbia Redevelopment Act, where this Court said, "We do not sit to determine whether a particular . . . project is or is not desirable." In *Harrison-Halstead Com. Group v. Housing & Home Finance*, 310 F. 2d 99, 105, (a case involving location of a branch of the University of Illinois in Chicago, Chicago Campus Project) the Court said: "Courts have consistently denied the standing of citizens to challenge the choice made by public authorities between different and competing public uses."

The funding of the take over and expansion of the Montgomery Center was a matter within the competency of the State Legislature.

The leading Alabama case involving the location of higher education facilities is *Stevens v. Thames*, 204 Ala. 486, 86 So. 77, which was an action against The Trustees of the University of Alabama and the officials of The University of Alabama to enjoin the removal from Mobile to the University of Alabama of the Mobile Medical College facilities. The Alabama Supreme Court said: "This, however, is a question which must address itself to the lawmaking body, and with which the Court cannot deal."

Congress rather than expanding an already established institution, Howard College, a predominately Negro institution. Also located in Washington are a number of other institutions, both public and private, some predominately white and predominately Negro."

(From Plaintiffs' (Appellants) Exhibit 20 to deposition of Dr. Philpott, R. 89, R. 151, 153).

Courts do not fund or locate post offices, military bases, dams, harbors, public power plants, universities, or highways.

The record clearly sets forth the educational needs in the Montgomery area. Auburn University, administered through its Board of Trustees, is a broad-based, fully accredited university with programs leading to Doctorate degrees. It has a faculty of over 850, and is already operating the former University of Alabama Center, and is carrying on a graduate program under a commitment to the Air University located at Maxwell Air Force Base in Montgomery (R. 773, R. 802), a program which was recently handled by George Washington University (R. 220).[8] Auburn's Montgomery Branch will provide expansion of educational opportunity for students of all races and creeds, "without any equivocation" (R. 773, R. 804).

Auburn University has, as observed by the Court, dealt with the racial integration matter fairly, and in good faith (R. 702). In *Franklin v. Parker*, 223 F. Supp. 724, modified and affirmed, 331 F. 2d 841, the issue was academic qualification. Judge Johnson, who heard and decided *Franklin* in the District Court, and who authored the opinion in this case, is intimately familiar with Auburn's record (R. 702). Indeed, Auburn University has been progressively active in programs, fully integrated, dealing with desegregation in

[8] "The staff of the Air University is anxious to expand the educational programs for officers and airmen at Maxwell and Gunter Air Force Bases." (Plaintiffs' (Appellants) Exhibit 1, to Head Deposition, R. 191, R. 292). "They are currently operating with outside institutions including George Washington University. They would prefer having a total and expanded program dealing with a single university" (R. 314).

southern schools (R. 807). "We have been operating this program under a federal grant for the last four years, and it will be extended for next year" (R. 807). Auburn's administration has dealt with this matter on campus as professional educators doing a job. The Montgomery program will be an educational program, for all students, white and Negro (R. 808).

Appellants (plaintiffs below) did not make out a case for declaratory or injunctive relief. Indeed, the record negatives their vague and unsupported assertions of contravention of the Constitution of the United States. The record clearly sets forth the need and desirability for the establishment of the Auburn University Branch at Montgomery, bringing expanded educational opportunities to where the people are, and for the benefit of all citizens, Negro and white, utilizing the presently available, substantial facilities of the University of Alabama (now Auburn) Montgomery Center, and continuing and expanding them through a broad-based, large university, with a present faculty resource of over 850 members. The need for such a branch has been legislatively determined, is supported by experience and studies of both university and civic organizations, and funds for a large campus site have been locally assured (R. 705). All this is to be implemented by the knowledge, experience, facilities, manpower, and resources of Auburn University which has already demonstrated an affirmative approach to making the benefits of educational opportunity available to all, without distinction as to the race or color of anyone seeking the benefits.[4]

[4] Plaintiffs' (Appellants) Exhibit 3 (R. 192) to the Head Deposition, contains a copy of an editorial of February 23, 1968,

Green v. County School Board of New Kent County, 391 U. S. 430, referred to by Appellants and the three-judge Court (R. 702) does not hold that the bringing of fully racially integrated educational opportunities to a community is unconstitutional. The Auburn University Branch at Montgomery will bring wide educational opportunities to a population center, where education may be pursued by thousands of people, white and Negro, many of whom would otherwise not get an education at a higher educational level (Testimony

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from *The Montgomery Advertiser* (R. 516) which says: "The fact that Montgomery already has a state-supported, four-year college, Alabama State, does not confer squatter's rights. The city needs the kind and quality of education which the center can provide and doubtless many qualified Negro students will avail themselves of its courses. However, we doubt it will put Alabama State out of business or Huntingdon or Alabama Christian.

"If this competition puts Alabama State on its mettle, fine. State students will surely benefit. We realize that competition has become, in some circles, an ugly word, but we are old-fashioned enough to believe it's a good thing.

"The suit makes no sense. We hope that the three-judge court requested to hear it will find that a new facility, which would be a great boon to both races in the city, and which will come into being with its doors open to all who are qualified, is not a social evil for which there is a judicial remedy.

"If a new college for Montgomery is discrimination, then the word has lost the last shred of meaning."

Plaintiffs' same exhibit (R. 519) contains a March 1, 1968, editorial in *The Birmingham News* which says: "With the selection of a location in Montgomery for a four-year branch of Auburn University, the structure of state-supported urban education in Alabama nears completion. This is an important step in the educational life of our state, and one which should pay dividends many times over in the coming years."

of Dr. Levi Watkins, President of Alabama State College, R. 854, 855, 857).

The District Court significantly observed:

> "We believe that an effective beginning has been made at Auburn to dismantle the racial characteristics of that school system and that, as effective desegregation plans are developed in the elementary and secondary public schools, the problem will probably resolve itself in the case of higher education. If the Auburn branch at Montgomery is administered as 'just a school,' as we are assured it will be and as we are confident it will be, our conclusions as herein outlined will receive significant confirmation." (R. 703), 289 F. Supp. 784, 790.

CONCLUSION

The legislation funding the proposed Auburn Branch became law September 8, 1967 (R. 22). The Board of Trustees of Auburn University accepted the assignment and plans went forward toward establishment of the Branch, and on February 21, 1968, this action was filed casting a cloud over the development. The case has been fully developed and heard, and a three-judge Court has unanimously spoken. It is respectfully submitted that Appellants, within the bounds of the present record, present no substantial question, and that the judgment and decree of the District Court should be affirmed, so that Auburn University may get on with the business of completing its

branch campus and educating students, white and Negro, in the Montgomery area.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

ALABAMA STATE TEACHERS ASSOCIATION ET AL. *v.* ALABAMA PUBLIC SCHOOL AND COLLEGE AUTHORITY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA.

No. 731. Decided January 20, 1969.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS, dissenting.

If my Brother HARLAN is correct and this is a local, as distinguished from a state-wide, law, a question not requiring a three-judge court (*Moody* v. *Flowers*, 387 U. S. 97), then we have been woefully wrong in other school integration cases. For they have almost always involved a single public school, which usually is wholly local in its operation. But in those other three-judge court cases we dealt with the operation of a state-wide racial segregation regime. The present Act (Ala. L. 1967, No. 403) regulates a state agency, the Alabama Public School and College Authority, which issues and sells bonds. And these bonds, so the case tells us, are sold to construct what threatens to become an all-white university.[1]

Can we say in 1969 that a State has no duty to disestablish a dual system of higher education based upon race? The three-judge court in a careful opinion seems to draw a line between elementary and secondary schools on one hand and colleges and universities on the other.

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[1] The counterpart of this predominantly new all-white university is Alabama State College, predominantly Negro.

The inference is that if this were an elementary school, the result would be different.[2]

The problem is in effect a phase of "freedom of choice" which was before us in another aspect in *Green* v. *County School Board*, 391 U. S. 430.[3]

I would note probable jurisdiction and set the case for argument.

MR. JUSTICE HARLAN, dissenting.

Only two years ago, *Moody* v. *Flowers*, 387 U. S. 97, 101 (1967), made it clear that a three-judge court need not be convoked whenever "a state statute is involved but only when a state statute of general and state-wide application is sought to be enjoined." Although this holding was solidly grounded in precedent and in policy, the Court today abandons *Moody* without explanation by taking jurisdiction to affirm this judgment summarily.

The case before us does not involve a statute of "general and statewide application." Appellants are simply trying to prevent the construction of a single public college to be located in the City of Montgomery. Appellants merely attack a statute which "authorize[s] the Alabama public school and college authority . . . to issue . . . additional bonds in the amount . . . of $5,000,000 for the purpose of constructing . . . a four-year college at Montgomery under the supervision and control of the board of trustees of Auburn University." Ala. Acts, No. 403 (1967).[1] The fate of this one school,

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[2] This is on its face an amazing statement, as the forerunners of *Brown* v. *Board of Education*, 347 U. S. 483, 349 U. S. 294, were cases involving higher education. See *Missouri* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Board of Regents*, 332 U. S. 631; *Sweatt* v. *Painter*, 339 U. S. 629; *McLaurin* v. *Regents*, 339 U. S. 637.

[3] And see *Raney* v. *Board of Education*, 391 U. S. 443; *Monroe* v. *Board of Commissioners*, 391 U. S. 450.

[1] Although the appellants' original complaint also contained a challenge to the constitutionality of the Alabama statute creating the State's Public School and College Authority, Ala. Acts, No. 243 (1965), this challenge was abandoned at the hearing on the merits. See — F. Supp. —, —, n. 1 (1968).

like the fate of a county-wide reapportionment plan, *Moody* v. *Flowers, supra,* or the affairs of a regional drainage district, *Rorick* v. *Commissioners,* 307 U. S. 208 (1939), is not to be decided by a special three-judge court. As *Moody* and *Rorick* teach, the bare fact that a state statute is involved is not enough to trigger 28 U. S. C. § 2281.[2]

We do not deal here with a state statute which "embodies a policy of statewide concern," *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89, 94 (1935), but one which expresses a judgment that more educational facilities are needed in a particular locality. Indeed, appellants' constitutional attack on the statute is entirely based on the peculiar local situation existing in Montgomery. At present, there are two state-supported institutions of higher learning in the city. Alabama

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[2] While my Brother DOUGLAS is quite right in noting that *Brown* v. *Board of Education* and its three companion cases, 347 U. S. 343 (1954), were heard on appeal from three-judge District Courts, he fails to recognize that in each of these cases, appellants had sought to enjoin the operation of a state statute or constitutional provision of general application that either required or authorized racial segregation in public and secondary schools. *Id.,* at 486, n. 1. See also, *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637 (1950). In contrast, our "freedom of choice" decisions of last Term, *Green* v. *County School Board,* 391 U. S. 430 (1968); *Raney* v. *Board of Education,* 391 U. S. 443 (1968); *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968); came to us on certiorari from the Fourth, Eighth, and Sixth Circuits respectively, precisely because the plans promulgated by the school boards in those cases were not of state-wide scope. See also, *Cooper* v. *Aaron,* 358 U. S. 1 (1958) (on certiorari to the Eighth Circuit); *Griffin* v. *School Board,* 377 U. S. 218 (1964) (on certiorari to the Fourth Circuit); *Bradley* v. *School Board,* 382 U. S. 103 (1965) (on certiorari to the Fourth Circuit); *Rogers* v. *Paul,* 382 U. S. 198 (1965) (on certiorari to the Eighth Circuit); cf. *Watson* v. *Memphis,* 373 U. S. 526 (1962) (on certiorari to the Sixth Circuit).

Indeed, even when there is an attack on a state-wide statute which requires racial discrimination on its face, a three-judge court need not be convoked if the statute is clearly invalid under pre-existing case-law. *Bailey* v. *Patterson,* 369 U. S. 31 (1962).

State is a four-year college which has traditionally been attended by Negroes. Alabama Extension Center, on the other hand, has a predominantly white enrollment, but does not at present grant degrees, offering its students a set of "extension" courses. The Extension Center, however, will be enlarged to create Birmingham's new four-year college, while Negro Alabama State has been entirely ignored in the planning. Appellants contend that, at a minimum, the State's College Authority was constitutionally obliged to consider the possibility of coordinating the new college's operations with those of Alabama State before the Authority could properly embark on its present course.

This brief outline of the facts demonstrates that we are dealing with an essentially local dispute which could properly be heard first by a single District Judge and then by the Court of Appeals before it came to us on certiorari.[3]

I would dismiss this appeal for want of jurisdiction.

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[3] Appellants themselves seem to have recognized that this Court's jurisdiction is questionable. They filed a protective appeal with the Court of Appeals for the Fifth Circuit on August 23, 1968. That court is holding the appeal in abeyance pending our decision in this case. See Jurisdictional Statement, p. 2, n. 1.